In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1059

SOUTHERN PACIFIC LAND COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1958, the government began condemnation proceedings in the United States District Court for the Southern District of California to acquire fee title to more than 17,750 acres of land in that district for the Lemoore Naval Air Station. In its answer to the complaint (2 R. 360–362), petitioner, the owner of some 4,600 acres of the land involved, opposed the taking of fee title and requested the court to limit the estate taken by the government by reserving to petitioner all mineral rights, subject to restrictions on their exploitation necessary to avoid interference with the operation of the air station. Petitioner alleged that the government's failure so to restrict its declaration

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of taking was "unreasonable, capricious, arbitrary and an abuse of discretion" (2 R. 361).

After lengthy proceedings, the district court rejected petitioner's contentions and ruled that the government was entitled to take the estate described in its complaint and declaration of taking. The court held that "the necessity, character and extent of a taking is not subject to judicial review" (Pet. App. 8) and that, in any event, there is "no evidence to support the contention that the Assistant Secretary of the Navy acted in bad faith or arbitrarily or capriciously" (Pet. App. 12). The court of appeals affirmed (Pet. App. 1–5; 367 F. 2d 161). That court found it unnecessary to pass on the principal question tendered by the petitioner here—*i.e.*, whether there may be judicial review of a decision to condemn particular property or a particular property interest where the decision is alleged to be arbitrary or capricious. The court ruled, rather, that, even if such a limited power exists, the decision must be affirmed, "since we agree with the district court that [petitioner] failed to show that the decision to take its mineral rights was arbitrary, capricious, or made in bad faith" (Pet. App. 3).

The decision below was correct and does not warrant review by this Court. It is well settled that, where property is taken for a public use, it lies within the discretion of the condemning agency to determine whether to take fee title or some lesser estate. See, *e.g.*, *United States* v. *91.69 Acres of Land*, 334 F. 2d 229, 231–232 (C.A. 4); *Lewis* v. *United States*, 200 F.

2d 183 (C.A. 9); *United States* v. *Meyer,* 113 F. 2d 387, 392 (C.A. 7); cf. *United States* v. *64.88 Acres of Land,* 244 F. 2d 534 (C.A. 3). This Court recently reaffirmed the principle in *Berman* v. *Parker,* 348 U.S. 26, where it was contended, *inter alia,* that the government did not need fee title to the land involved to effectuate its urban redevelopment program and should be limited to taking title to the offensive buildings. The Court there stated (348 U.S. at 35–36):

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker* v. *United States,* 147 U.S. 282, 298; *United States ex rel. T.V.A.* v. *Welch,* [327 U.S. at] 554; *United States* v. *Carmack,* 329 U.S. 230, 247.
>
> The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F. Supp. 705, 715–719. We do not share those doubts. If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the

> function of the courts to sort and choose among the various parcels selected for condemnation.
>
> The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

See, also, *Starr* v. *Nashville Housing Authority*, 354 U.S. 916, affirming *per curiam* 145 F. Supp. 498 (M.D. Tenn.).

Petitioner contends, however, that the courts are not absolutely prohibited from reviewing the exercise of this discretion and that judicial review is available where it is alleged that the taking, encompassing more than is absolutely necessary to the public use involved, is "arbitrary" or "capricious." As the court below noted, there are *dicta*[1] in a number of decisions to the effect that limited judicial review is permissible to protect against arbitrary action. *E.g., 2,935.15 Acres of Land* v. *United States*, 350 F. 2d 356, 359 (C.A. 5); *Wilson* v. *United States*, 350 F. 2d 901, 907 (C.A. 10); *United States* v. *64.88 Acres of Land*, 244 F. 2d 534, 536 (C.A. 3); *Simmonds* v. *United States*, 189 F. 2d 305, 306 (C.A. 9). A typical statement is the Fourth Circuit's, in *United States* v. *91.69 Acres of Land*, 334 F. 2d 229, 232, that "it is at least theoretically conceivable that a case of arbitrary, capri-

[1] In *United States* v. *Agee*, 322 F. 2d 139, 142 (C.A. 6), the court expressly held "that the District Court was correct in reviewing the decision of the condemning authority to the extent of determining whether the decision was made in bad faith * * *." The court went on to hold that the decision to take land above the high water mark, not strictly necessary to the river improvement project in question, was not made in bad faith and was therefore permissible.

cious or corrupt conduct might arise which would call for judicial intervention." On the other hand, there are cases which "state flatly that the legislative or administrative determination of the taking required for a public use is not open to judicial inquiry." *United States* v. *New York*, 160 F. 2d 479, 480 (C.A. 2), and cases cited. And the Eighth Circuit has so held in a case analogous to the case at bar. *United States* v. *Mischke*, 285 F. 2d 628.[2]

This case presents no occasion for this Court to declare, as petitioner requests, which of these statements accurately reflects the law—*i.e.*, to pronounce whether or not there is indeed an absolute bar to judicial inquiry into the extent of a taking found, in general, to be for a public use. For it is clear, as the courts below found, that the acquisition of fee title in this case was within the permissible discretion of the taking agency. A much stronger showing than that made by petitioners is required to support a conclusion that the taking of fee title to land for the construction of an air station is not an authorized taking for a "public use". It is not a requisite of eminent domain that every inch of the land condemned or every attribute of the title taken must be essential to, or even utilized in, the project. See *United States ex.*

[2] The district court had found that 42.5 acres of the land taken were not needed for flood control, the declared purpose of the taking, and that this portion of the taking was arbitrary and capricious. The court of appeals assumed the correctness of the lower court's findings, but held that the trial court "lacked authority" to review the necessity of the taking of the 42.5 acres (285 F. 2d at 631).

rel. Tennessee Valley Authority v. *Welch*, 327 U.S. 546; *Brown* v. *United States*, 263 U.S. 78, 82; *United States* v. *Agee*, 322 F. 2d 139, 142–143 (C.A. 6); *United States* v. *Mischke*, 285 F. 2d 628, 631–33 (C.A. 8).

Petitioner relies on the deposition testimony of Fred A. Bantz (2 R. 111–131), who was an Assistant Secretary of the Navy at the time of the taking and, in that capacity, signed the declaration of taking involved here. This testimony does not establish that the taking of fee title was arbitrary or capricious.[3] On the contrary, as the court below noted, "the uncontradicted testimony of the Assistant Secretary was that he based his decision in part upon the fact that the existence of outstanding mineral interests, conflicting with possible surface uses, would reduce the marketability of the property in the event of sale" (Pet. App. 4). And, as the court further noted, "[a]dvantageous liquidation of the Government's investment is a legitimate consideration in determining the estate to be taken." See *Lewis* v. *United States*, 200 F. 2d 183, 185 (C.A. 9); *United States* v. *New York*, 160 F. 2d 479, 481 (C.A. 2); cf. *United States ex rel. Tennessee Valley Authority* v. *United States*, 327 U.S. 546, 554; *Old Dominion Land Company* v. *United States*, 269 U.S. 55, 66.

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[3] The deposition was taken more than six-and-a-half years after the declaration of taking (2 R. 111, 225–227) and more than five years after Mr. Bantz left the position of Assistant Secretary (2 R. 112). Mr. Bantz noted that he was only "somewhat" able to refresh his recollection of the events surrounding the taking from the government's files (2 R. 116).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967